BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

OPINION OF THE COURT OF APPEALS.

The opinion of the Circuit Court of Appeals, Eighth Circuit, is reported in 140 Fed. (2d) 2, and is set out on pages 5 to 12 of the "proceedings in the Circuit Court of Appeals" which is a part of the record filed herein.

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. A., Sec. 347).

The judgment of the Circuit Court of Appeals reversing the judgments of the District Court in favor of petitioner was rendered on January 24, 1944 (R. pp. 11-12 of proceedings in Cir. Ct. Ap.), and petition for rehearing was denied on February 10, 1944 (R. p. 5 of proceedings in Cir. Ct. Ap.). Thirty days stay of mandate was granted on February 21, 1944 (R. p. 51 of proceedings in Cir. Ct. Ap.).

The following cases are believed to sustain the jurisdiction of this Court:

Leishman v. Associated Wholesale Electric Co., 318 U. S. 203, 205;
Montgomery Ward & Co. v. Duncan, 311 U. S. 243 247;
Sebach v. Wilson & Co., 312 U. S. 1, 7;
Berry v. United States, 312 U. S. 450, 451-453;
Erie Railroad Co. v. Tompkins, 304 U. S. 604.

III.

STATEMENT OF CASE.

In the petition for the writ is a statement of the case so far as is material to a consideration of the questions presented, and in the interest of brevity a statement of the case is not repeated here.

IV.

SPECIFICATION OF ERRORS.

Petitioners assign the following errors for a reversal of the judgment of the Court of Appeals:

1. The Court of Appeals erred in its assumption and holding that the consolidation for trial in the District Court in conformity with Rule 42 (a), F. R. C. P., of the separate actions brought by respondent against petitioners had the effect of merging or converting those actions into one action and that, as a consequence, the refusal of the District Court to give an additional charge to the jury with respect to the respondent's statement in his application for the policy issued by the New York Life Insurance Company concerning his occupation and his duties in that occupation was prejudicial to respondent in his action against The Connecticut Mutual Life Insurance Company and required a reversal of the judgment in favor of the petitioner, The Connecticut Mutual Life Insurance Company, in that action.

This assumption and holding of the Court of Appeals is in conflict with the holding of this Court in Mutual Life Insurance Co. v. Hilmon, 145 U. S. 285, 293; Johnson v. Manhattan Railway Co., 289 U. S. 479, 496, and is also in conflict with the holding of the Courts of Appeals in other circuits in Toledo, St. L. & K. C. R. Co. v. Continental Trust Co. (C. C. A. 6), 95 Fed. 497, 506; Butler v. Evening Post Pub. Co. (C. C. A. 4), 148 Fed. 821, 824, and Nolte v. Hudson Navigation Co. (C. C. A. 2), 11 F. (2d) 680, 682.

2. The Court of Appeals erred in holding that respondent's exception to the charge of the District Court because it did not inform or advise the jury what respondent had said in his application for the New York Life policy concerning his occupation and his duties in that occupation was equivalent to a request by respondent for an additional charge to the jury with respect to what respondent had said in his application for the New York Life policy concerning his occupation and his duties in that occupation.

This holding is contrary to the holding of this Court in Backus v. Fort Street Union Depot Co., 169 U. S. 557, 575, and is likewise contrary to the holding of the Courts of Appeals for the Sixth Circuit in Keystone Coal & Coke Co. v. Fekete (C. C. A. 6), 232 Fed. 72, 77; Young v. Corrigan (C. C. A. 6), 210 Fed. 442, 443, and to the previous holding of the Eighth Circuit in Frizzel v. Omaha St. Ry. Co. (C. C. A. 8), 124 Fed. 176.

Furthermore, there was no written request by respondent for an additional instruction concerning the occupation and the duties of the occupation given by him in his application for the New York Life policy, as required by Rule 51, Federal Rules Civil Procedure, and an oral request for such an additional charge would not be reviewable on appeal (Indemnity Insurance Co. of North America v. Moses (C. C. A. 5), 36 F. (2d) 219, 220; Dallas Ry. & Terminal Co. v. Sullivan (C. C. A. 5), 108 F. (2d) 581, 584.

3. The Court of Appeals erred in holding that if the primary and principal duties of respondent's occupation at the time of the issuance of the policies were the manual work of hairdressing, then under the Missouri law respondent's inability to perform that work following the amputation of his arm rendered him totally and permanently disabled, even though he was able to perform the executive, managerial and supervisory duties in connection with the operation of his hairdressing shop.

This holding is contrary to the holding of the Missouri courts in the following cases:

Comfort v. Travelers Insurance Co. (Mo. Ap.), 131 S. W. (2d) 734, 740;

Hamm v. Metropolitan Life Ins. Co. (Mo. Ap.), 166 S. W. (2d) 324, 331;

Kane v. Metropolitan Life Ins. Co. (Mo. Ap.), 73 S. W. (2d) 826, 829;

Harms v. Mutual Life Ins. Co. (Mo. Ap.), 127 S. W. (2d) 57, 60;

Smith v. Metropolitan Life Ins. Co. (Mo. Ap.), 108 S. W. (2d) 995, 998;

Eden v. Metropolitan Life Ins. Co. (Mo. Ap.), 138 S. W. (2d) 745;

Rogers v. Metropolitan Life Ins. Co. (Mo. Ap.), 122 S. W. (2d) 5, 7;

Wright v. Metropolitan Life Ins. Co. (Mo. Ap.), 115 S. W. (2d) 102, 103;

Buis v. Metropolitan Life Ins. Co. (Mo. Ap.), 77 S. W. (2d) 127, 132;

Burns v. Aetna Life Ins. Co. (Mo. Ap.), 123 S. W. (2d) 185, 191;

Tripp v. Metropolitan Life Ins. Co. (Mo. Ap.), 44 S. W. (2d) 250, 253;

Pollack v. Missouri State Life Ins. Co. (Mo. Ap.), 123 S. W. (2d) 212, 214;

Barton v. Metropolitan Life Ins. Co. (Mo. Ap.), 103 S. W. (2d) 889, 891;

Brown v. Mutual Life Ins. Co. (Mo. Ap.), 140 S. W. (2d) 91, 94;

Stearns v. Prudential Ins. Co. (Mo. Ap.), 140 S. W. (2d) 766, 773.

ARGUMENT.

I.

The consolidation of the two actions for trial under Rule 42 (a), F. R. C. P., did not merge the two actions into one action, and therefore the refusal of the District Court to charge the jury with respect to respondent's statement in his application for the New York Life policy concerning his occupation and the duties of such occupation was not prejudicial to respondent in his action on the Connecticut Mutual policy and did not justify a reversal of the judgment in favor of the Company in that action.

In holding that the refusal of the District Court to give an additional charge to the jury with respect to respondent's statement in his application for the policy issued by the New York Life Insurance Company concerning his occupation and his duties in that occupation was prejudicial to respondent, the Court of Appeals said:

> "The situation is that the court in summarizing an important aspect of the evidence—statements by appellant in these and other applications for insurance—outlined the evidence favoring appellees and, when requested to cover the same aspect where favorable to appellant, omitted to do so.
>
> "While a trial court is not at all required to state his recollection of the evidence with nice exactitude for both sides, yet if such summary is made, it must be fair to both sides to the extent that it is not so one-sided or so warped that it must be regarded as prejudicial to one side in its effect upon the jury."

There can be no question but that in the action on the Connecticut Mutual policy it was proper for the District

Court to charge the jury what respondent had stated in his application for that policy concerning his occupation and his duties in that occupation, since the test of respondent's disability, even under the Court of Appeals' conception of the Missouri law, was whether, following the amputation of his left arm, the respondent was able to perform the same duties of the same occupation in which he was engaged at the time of the issuance of the policies.

Therefore, in reversing the judgment in favor of The Connecticut Mutual Life Insurance Company because of the refusal of the District Court to include in its charge the statement made by respondent in his application for the policy issued by the New York Life Insurance Company concerning his occupation and his duties in that occupation, the Court of Appeals necessarily assumed and held that the consolidation of the two actions for trial had the effect of merging or converting them into one action because otherwise the refusal of the District Court to charge the jury with respect to the statements made by respondent in his application for the New York Life policy could have had no materiality or bearing in his action on the Connecticut Mutual policy. In other words, if the respondent had only sued The Connecticut Mutual Life Insurance Company on its policy, what the respondent had said in his application for the policy issued by the New York Life Insurance Company with respect to his occupation, and his duties in that occupation, would not have been relevant or material and it would certainly not have been prejudicial or reversible error for the District Court, in an action on the Connecticut Mutual policy, to have refused to charge the jury on respondent's behalf with respect to his statement in his application for the New York Life policy concerning his occupation and his duties in such occupation, even if that application had

been admitted in evidence in the action on the Connecticut Mutual policy.

This Court has heretofore held that the consolidation for trial of two or more actions did not merge or convert them into one action.

In Mutual Life Insurance Co. v. Hilmon, 145 U. S. 285, 293, this Court in that connection said:

> "But although the defendants might lawfully be compelled at the discretion of the court to try the cases together, **the causes of action remained distinct and required separate verdicts and judgments** * * *."

Likewise in Johnson v. Manhattan Railway Co., 289 U. S. 479, 496, the Court said:

> "Under the statute, 28 U. S. C., sec. 734, consolidation is permitted as a matter of convenience and economy in administration, **but does not merge the suits into a single cause**, or change the rights of the parties or make those who are parties in one suit parties to the other (Toledo, St. L. and K. C. R. Co. v. Continental Trust Co., 95 Fed. 497, 506; Taylor v. Logan Trust Company, 289 Fed. 51, 53; Nolte v. Hudson Navigation Co., 11 Fed. [2d] 680, 682; Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285, 293)."

Also to the same effect are: Toledo, St. L. & K. C. R. Co. v. Continental Trust Co. (C. C. A. 6), 95 Fed. 497, 506; Butler v. Evening Post Pub. Co. (C. C. A. 4), 148 Fed. 821, 824; Nolte v. Hudson Navigation Co. (C. C. A. 2), 11 Fed. (2d) 680, 682.

Rule 42 (a) F. R. C. P. relating to the consolidation of causes for trial does not purport to merge or convert two or more actions into one action. That rule provides:

> "**Consolidation.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the

> matters in issue in the actions; it may order all the actions consolidated, and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delays."

Whether the consolidation of these causes for trial resulted in the merger of these two actions into one action under Rule 42 (a), F. R. C. P., involves an important question of federal practice which should be determined by this Court and it has heretofore held that certiorari would be granted where the proper construction of the Rules of Civil Procedure is involved. In Leishman v. Associated Electric Co., 318 U. S. 203, 205, the Court in that connection said:

> "We granted certiorari to settle the important question of practice presented under the Rules of Civil Procedure."

And likewise in Montgomery Ward & Co. v. Duncan, 311 U. S. 243, 247, the Court said:

> "The importance of a decision by this court respecting the proper practice under Rule 50 (b) and a conflict of decisions moved us to grant certiorari."

And in the following cases it was likewise held that the proper construction of the Federal Rules of Civil Procedure was of such importance as to require the granting of a writ of certiorari:

> Becha v. Wilson & Co., 312 U. S. 1, 7;
> Berry v. United States, 312 U. S. 450, 451-453.

II.

An exception to the charge of the District Court is not the equivalent of a request for an additional charge.

If respondent desired the District Court to instruct the jury with respect to his statement in his application for the New York Life policy concerning his occupation, and

his duties in that occupation, it was incumbent on respondent to request the trial court to give an additional charge to the jury to that effect. No such request was made by respondent. On the contrary, the respondent merely excepted to the charge given by the District Court because it did not tell the jury what respondent had said in his application for the New York Life policy concerning his occupation and his duties in that occupation. This exception the Court of Appeals treated as the equivalent of a request by the respondent for an additional charge.

Respondent's exception to the charge of the District Court was as follows (R. 367):

> " 'Mr. Tombrink: I notice, your Honor, there was nothing said here in the instructions about the policy of the New York Life.
>
> The Court: Yes; it is there.
>
> Mr. Tombrink: Or I mean the application, your Honor, of the New York Life, but that the Court does refer to the application of The Connecticut Mutual Life Insurance Company, to the effect that on November 18, 1931, in his application for the policy, Mr. Sperber stated his principal occupation was that as proprietor of the Sperber Hair Shop, and that his duties in such occupation were executive and a small amount of cosmetology. I saw nothing in the charge of the Court regarding the application of the New York Life Insurance Company, the other defendant here, whose defense was consolidated with that of the Connecticut Mutual in this trial, as to what that application showed, and that application showed that Mr. Sperber was a hairdresser.
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> The Court: Says he was owner of a hair-dressing shop, if I am not mistaken.
>
> Mr. Tombrink: That is the only objection, your Honor, that I desire to the Court's instructions to the jury.
>
> The Court: Very well.
>
> Mr. Tombrink: Save my exceptions to that.' "

That the Court of Appeals treated this exception as the equivalent of a request by respondent for an additional charge is manifest from the following portion of its opinion:

> "The situation is that the court * * * **when requested to cover the same aspect where favorable to appellant omitted to do so.**"

This Court has heretofore held that an exception to a charge of the District Court cannot be considered as the equivalent of a request for an additional charge.

In Backus v. Fort Street Union Depot Co., 169 U. S. 557, 575, the Court said:

> "A sufficient answer is that the respondents did **not ask** any further instructions. **All** they **did was** to **except** to **what had been stated.** By well-settled rules, **no appellate court** would, under such circumstances, **be required to set aside** the judgment of the trial court."

In Keystone Coal & Coke Co. v. Fekete (C. C. A. 6), 232 F. 72, 77, the Court said:

> "**An exception** was taken in general terms **to the failure of the Court to charge** upon the **subject** of the effect of the **lease, but such an exception cannot supply** the place of a **necessary** preliminary **request.** An **exception alone** is **sufficient** to **reach** an error of **commission** in the **charge**, but it may **not be** as to an **error of omission.**"

In Young v. Corrigan (C. C. A. 6), 210 Fed. 442, 443, the Court said:

> "**Even had** an **exception been taken** (as it was not) to the **failure to instruct, plaintiff could not complain,** for it is **no ground of reversal that the Court failed to give instructions not requested.** Express Co. v.

Kountze, 8 Wall. 342, 353; Texas & Pacific Ry. Co. v. Volk, 151 U. S. 73, 78; Isaacs v. United States, 159 U. S. 487; Humes v. United States, 170 U. S. 210, 211; Coney Island v. Dennan (C. C. A. 6), 149 Fed. 487."

In Frizzell v. Omaha St. Ry. Co. (C. C. A. 8), 124 Fed. 176, 180, the Court said:

> "Where there is no error in the charge given, **the omission** to give other rules of law or **to state other facts is not challenged by a mere objection or exception to the instruction.**"

Furthermore, Rule 51, F. R. C. P., requires that all requests for instructions to the jury must be **in writing**, and respondent made **no request in writing** that the jury be instructed with respect to what he had said in his application for the policy issued by the New York Life Ins. Co., concerning his occupation or his duties in that occupation. Rule 51 provides in that regard as follows:

> "At the close of the evidence or at such earlier time during the trial as the Court reasonably directs, any party may **file written requests** that the Court instruct the jury on the law as set forth in the requests."

In Indemnity Co. of North America v. Moses (C. C. A. 5), 36 Fed. 219, 220, the Court held that an oral request for a charge on an issue in the case presented nothing for review on appeal, and said:

> "If appellant, as it insists, also requested **orally** charges on the subject of partial or temporary disability, it still presents nothing here for review. An **oral request** merely to a charge on an issue in a case is not sufficient basis for an assignment of error in a federal appellate court; but in order to save a valid exception, it is essential to submit a request to charge in definite form. Southern Ry. Co. v. Shaw (C. C. A. 5), 86 F. 865, 871; Tennessee R. R. Co. v. Drake (C. C. A. 5), 276 F. 393."

And in Dallas Ry. & Terminal Co. v. Sullivan (C. C. A. 5), 108 Fed. 581, the Court held that an oral request for a charge presented nothing for review on appeal, because Rule 51, F. R. C. P., required all requests for charges to be in writing. The Court said (l. c. 584):

> "Under Federal Rules of Practice and Procedure appellants' assignments one and two must be overruled. First, because one **complaining** of the **refusal to give a charge must** be prepared to **show** that **he requested it in writing.** Indemnity Insurance Co. of North America v. Moses (C. C. A. 5), 36 Fed. 219; Rule 51, Rules of Civil Procedure. And appellant did not do this."

III.

The Court of Appeals failed to give effect to the Missouri law on the question of the total and permanent disability of the respondent.

Total disability is defined in the Connecticut Mutual policy as follows (R. p. 11):

> "Definitions. Total disability is incapacity resulting from bodily injury or disease to **engage in any occupation whatsoever for remuneration or profit.**"

The disability benefit of the New York Life policy also provides (R. p. 31):

> "Upon receipt by the Company * * * of due proof * * * that the Insured has become totally disabled by bodily injury or disease so that he is and will be thereby prevented **from performing any work, following any occupation** or **engaging in any business for remuneration or profit** * * * the company will grant the following benefits:"

While the evidence was in dispute whether the duties of respondent's occupation at the time the policies were issued and at the time of the automobile accident which resulted in the amputation of his left arm, were manual or executive, there was **no dispute** that following the amputation of his left arm the respondent was able to perform, and did perform, the executive, managerial and supervisory duties in connection with the operation of his hairdressing shops, for which he was paid a salary of $6,000 per annum (R. 179, 207), and respondent testified that these executive duties were worth the salary which he received for that work (R. 152). The evidence likewise shows that respondent's earnings from his hairdressing business were substantially the same after the amputation of his left arm as they had been prior thereto (R. 293).

The Court of Appeals ruled that under the Missouri law if the duties of respondent's occupation when the policies were issued and at the time of the automobile accident were predominantly manual, then the respondent would be totally and permanently disabled even though he was able, after the amputation of his arm, to perform, and did perform, the executive, managerial and supervisory duties in connection with the operation of his hairdressing shops. The Court of Appeals in that connection said:

> "This is a Missouri contract. In the scope of 'total' disability as used in insurance contracts, Missouri courts adhere to the so-called 'liberal rule' (Harms v. Mutual Life Insurance Co. of N. Y. [Mo. Ap.], 127 S. W. [2d] 57; Smith v. Metropolitan Life Ins. Co., 108 S. W. [2d] 995, 999, and see Heald v. Aetna Life Ins. Co. of Hartford, Conn. [Mo.], 104 S. W. [2d] 379, 383). That rule is that the disability is total if it renders insured
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> > 'unable substantially to perform the duties of his occupation; that is, unable to perform in the usual

and customary way the substantial acts of his occupation.' (Stoner v. N. Y. Life Ins. Co. [Mo. Ap.], 90 S. W. [2d] 784, 791.)[2]

"Having in mind this applicable rule of law and the above fact contentions of the parties, it is clear that the fact issue was whether appellant used his hands 'to perform in the usual and customary way the substantial acts of his occupation,' or whether the 'acts of his occupation' were so largely executive and managerial that any use of his hands in his occupation was relatively unsubstantial."

[2] For later phase of this case see Stoner v. N. Y. Life Ins. Co., 311 U. S. 464. Some of other cases announcing the rule are Heald v. Aetna Life Ins. Co. of Hartford, Conn. (Mo.), 104 S. W. (2d) 379, 383; Eden v. Metropolitan Life Ins. Co. (Mo. Ap.), 138 S. W. (2d) 745, 748; Comfort v. Travelers Insurance Co. (Mo. Ap.), 131 S. W. (2d) 734, 738-740; Rogers v. Metropolitan Life Ins. Co. (Mo. Ap.), 122 S. W. (2d) 5, 7; Wright v. Metropolitan Life Ins. Co. (Mo. Ap.), 115 S. W. (2d) 102, 103.

In other words, under the Court of Appeals' interpretation of the Missouri law whether the respondent was totally disabled by reason of the amputation of his left arm depended on whether he was able to perform the **particular work** of the **particular** occupation in which he was engaged when the policy was issued and when the accident occurred. This is, of course, the rule in Missouri and elsewhere where the policy insures against the insured's inability to engage in "his occupation" or to perform his usual and customary duties in his occupation, but it is not the rule in Missouri, where the policy, as here, only insured against the inability of the insured to engage in **any occupation** or to **perform any work** or to **engage** in **any business** for remuneration or profit. In Comfort v. Travelers Insurance (Mo. Ap.), 131 S. W. (2d) 734 (which is one of the cases cited by the Court of Appeals in support of its holding), the Court, in differentiating between two types or classes of disability coverage, said, l. c. 740:

"It is **important** to **observe** that in some of the cases which we have referred to or quoted from above, **the**

policy provision under review fixed the liability of the insurer upon the disability of the insured to prosecute **his occupation**, or **the occupation stated** in **the policy**. Of course, under **such** a **policy provision** total disability **means inability** to do all the substantial and material acts necessary to the prosecution of the **insured's occupation**, or the **occupation stated** in the **policy**, in a customary and usual manner. **But** the **policy provision** with which **we** are **here concerned fixes liability** upon the disability of the insured to pursue '**any** and all **gainful occupations.**' **Such disability** means inability to do all the substantial acts necessary to the prosecution of **any gainful occupation** in a customary and usual manner."

And, likewise, in Hamm v. Metropolitan Life Ins. Co. (Mo. Ap.), 166 S. W. (2d) 324, 331, the Court said:

> "It must be **remembered, however**, that the policy involved herein did **not** insure him * * * **against disability that** would **prevent him from** doing **any particular kind of work**. The policy herein required proof of 'permanent and total' disability such as would prevent him from 'engaging in **any occupation** and performing **any work** for compensation or profit. Plaintiff's own testimony * * * refutes the contention that he was not able to **engage** in **any occupation** or **perform any work** for compensation."

And, likewise, in the following cases the Missouri courts have recognized and given effect to the distinction between a **particular** occupation clause and an "any occupation" or "any work" clause of the policy in the determination of the question whether the insured was totally disabled within the meaning of the policy:

Kane v. Metropolitan Life Ins. Co. (Mo. Ap.), 73 S. W. (2d) 826, 829;

Harms v. Mutual Life Ins. Co. (Mo. Ap.), 127 S. W. (2d) 57, 60;

Smith v. Metropolitan Life Ins. Co. (Mo. Ap.), 108 S. W. (2d) 995, 998;

Eden v. Metropolitan Life (Mo. Ap.), 138 S. W. (2d) 745;

Rogers v. Metropolitan Life Ins. Co. (Mo. Ap.), 122 S. W. (2d) 5, 7;

Wright v. Metropolitan Life Ins. Co. (Mo. Ap.), 115 S. W. (2d) 102, 103;

Buis v. Prudential Ins. Co. (Mo. Ap.), 77 S. W. (2d) 127, 132;

Burns v. Aetna Life Ins. Co. (Mo. Ap.), 123 S. W. (2d) 185, 191;

Tripp v. Metropolitan Life Ins. Co. (Mo. Ap.), 144 S. W. (2d) 160, 163;

Katz v. Union Central Life Ins. Co. (Mo. Ap.), 44 S. W. (2d) 250, 253;

Pollack v. Missouri State Life Ins. Co. (Mo. Ap.), 123 S. W. (2d) 212, 214;

Barton v. Metropolitan Life Ins. Co. (Mo. Ap.), 103 S. W. (2d) 889, 891;

Brown v. Mutual Life Ins. Co. (Mo. Ap.), 140 S. W. (2d) 91, 94;

Stearns v. Prudential Ins. Co. (Mo. Ap.), 140 S. W. (2d) 766, 773.

In Heald v. Aetna Life Insurance Co. (Mo. Sup.), 104 S. W. (2d) 379, which is cited by the Court of Appeals in support of its holding, the Court was there dealing with a "**his**," i. e., a **particular**, **occupation**, and not with an "any occupation" or "any work" disability clause. This is clear from the statement on pages 380-381 of the opinion of the Court in the Heald case that the policy in that case insured against accidental injuries which "wholly and continuously disable insured * * * from performing any and every duty pertaining to **his occupation**."

Furthermore, the Missouri Supreme Court in the Heald case held that the **particular** occupation in which the insured was engaged when the policy was issued or when the insured sustained his alleged total disability would not be controlling, as was held by the Court of Appeals,

where, as here, the policy defined total disability as the inability of the insured to engage in "any occupation" and said (104 S. W. [2d], l. c. 383):

> "Total disability contemplated by an accident policy, **or the disability clause of a life policy** does not mean, as its literal interpretation would require, a state of absolute helplessness; rather the disability contemplated means inability to do all the substantial acts necessary to the prosecution of the insured's, **or, in many instances, any, business** or **occupation.**"

The extract from Stoner v. New York Life Insurance Co. (Mo. Ap.), 90 S. W. (2d) 784, which is relied on by the Court of Appeals in support of its holding, does not, in view of the statement in the preceding portion of the paragraph of the opinion, from which that extract is taken, support or sustain that holding. The entire paragraph of the opinion in the Stoner case from which the extract relied on by the Court of Appeals was taken was as follows:

> "**Excluding from consideration the last clause above mentioned,** such policy provision or provisions of a similar character have been given a liberal construction with a view of effectuating what is considered the intention of the parties to the contract at the time of entering therein, that of giving to the insured indemnity when he is injured as the result of bodily injury or disease to the extent that he is unable to carry on his business or occupation, which, before such bodily injury or disease he was able to carry on. Under such provisions, it is not required that the insured should be rendered absolutely helpless to be totally disabled within their meaning when the injuries which he has suffered render him unable substantially to perform the duties of his occupation; that he is unable to perform in the usual and customary way the substantial acts of his occupation."

It will be observed from the foregoing that the Court in the Stoner case was announcing the rule which prevailed

when "the last clause (of the policy) above mentioned" was excluded. The last clause of the Stoner policy to which the Court referred appears on the same page, to wit, page 791 of the opinion, and was as follows:

> "Upon failure to furnish such proof, or if the insured performs **any work**, or follows **any occupation** or engages in **any business** for remuneration or profit, no further income payments shall be made nor premiums waived."

Manifestly the Court of Appeals in the determination of this case has applied a rule of law taken from the opinion of the Missouri court in the Stoner case which that Court said only applied **in the absence** of a **clause** of the policy **that insured** must be unable to engage in **any occupation** or to perform **any work** for remuneration or profit.

Clearly, therefore, the Court of Appeals has determined these cases by the rule which prevails in Missouri where the policy insures against a disability to engage in a **particular** occupation or to perform the usual and customary duties of a **particular** occupation and not by the rule which prevails in that state where the policy, as here, only insures against a disability to engage in any occupation, or to perform any work or to engage in any business, for remuneration or profit.

Respectfully submitted,

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